Supreme Court, U.S.
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Case No. 10-1302

IN THE UNITED STATES SUPREME COURT

CARL PULATTI,
Petitioner,

v.

EDWIN G. BUSS, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

[As Restated]

Should this Court grant review of a case tried in 1984 in which a trial court exercised its discretion to deny a penalty phase severance for two defendants who were properly tried together in the guilt phase, who jointly committed a capital murder, and issued a joint interlocking confession, where resolution of the joinder claim by the state courts and Eleventh Circuit Court of Appeals does not conflict with any other court of appeals and does not present a significant unsettled question of constitutional law?

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The question of whether two properly joined capital defendants found guilty in a joint trial can be sentenced in a joint penalty phase is not an issue which has divided state or federal courts of appeals and does not implicate a serious constitutional question for this Court's review. Further, under the particular facts of this case, the result is not fairly debatable.

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CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Puiatti v. McNeil*, 626 F.3d 1283 (11th Cir. 2010).

JURISDICTION

This Court has jurisdiction pursuant to Title 28, United States Code, Section 1254(1) to review the decision of the Eleventh Circuit Court of Appeals. However, Respondent submits that no question contained in the petition is worthy of this Court's consideration.

CONSTITUTIONAL, STATUTORY, AND, PROCEDURAL PROVISIONS INVOLVED

The Respondent generally agrees with Petitioner's statement of relevant constitutional provisions.

STATEMENT OF THE CASE AND FACTS

The State cannot accept the Petitioner's statement of the case as it is primarily composed of argument.

A. State Court Procedural History

Petitioner, Carl Puiatti, along with his co-perpetrator Robert Dewey Glock, was charged by indictment with first degree murder, kidnapping and robbery. Trial by jury resulted in guilty verdicts and death recommendations by a vote of 11 to 1. The trial judge followed the recommendation and sentenced Puiatti to death.

Puiatti's convictions and sentences were affirmed by the Florida Supreme Court in *Puiatti v. State*, 495 So. 2d 128 (Fla. 1986). Puiatti sought certiorari review and this Court vacated and remanded for reconsideration in light of *Cruz v. New York*, 481 U.S. 186, 107 S. Ct. 1714 (1987). *Puiatti v. Florida*, 481 U.S. 1027, 107 S. Ct. 1950 (1987). Following briefs and oral argument, the Court affirmed. *Puiatti v. State*, 521 So. 2d 1106 (Fla. 1987), *cert. denied*, 488 U.S. 871, 109 S. Ct. 184 (1988).

Puiatti pursued post-conviction relief but his claims were summarily denied by the trial court. He pursued an appeal to the Florida Supreme Court and also filed a state petition for writ of habeas corpus. The court affirmed the denial of the 3.850 motion and also denied habeas relief. *Puiatti v. Dugger*, 589 So. 2d 231 (Fla. 1991).

Puiatti, through counsel, filed a series of successive motions for post-conviction relief which were summarily denied. The last successive motion was appealed to the Florida Supreme Court which affirmed the denial of relief. *Puiatti v. State*, 939 So. 2d 1060 (Fla. 2006).

B. Federal Court Procedural History

Puiatti filed his petition for writ of habeas corpus in the Middle District of Florida in April of 1992. The Court administratively closed the case in June of 1995 and reopened the case in March of 1998. The Court granted Petitioner's motion to hold proceedings in abeyance pending disposition of state court proceedings in July of 2002. On May 15, 2008, the District Court reopened the case, dismissing the original petition without prejudice to Puiatti filing an amended petition. On August 14, 2009, the District Court entered an Order granting Petitioner's Amended Petition for Writ of Habeas Corpus, overturning his sentence for the first degree murder of Sharilyn Ritchie. The Court denied the State's motion to alter or amend on October 15, 2009.

The State appealed and the Eleventh Circuit Court of Appeals reversed the district court in an opinion issued on November 29, 2010. *Puiatti v. McNeil*, 626 F.3d 1283, 1317-1318 (11th Cir. 2010).

C. Relevant Facts

i) Trial

In upholding the convictions and death sentences, the Florida Supreme Court set forth the following factual summary:

> Carl Puiatti and Robert D. Glock appeal their convictions for first-degree murder, kidnapping, and robbery, and their death sentences imposed by the trial judge in accordance with the jury's recommendation. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and we affirm the convictions and the death sentences.
>
> The trial record reflects that on August 16, 1983, the woman victim arrived at a Bradenton shopping mall. As she exited her automobile, Puiatti and Glock confronted her, forced her back inside the car, and drove away with her. They took $50 from her purse and coerced her into cashing a $100 check at her bank. They then took the victim to an orange grove outside Dade City where they took the woman's wedding ring and abandoned her at the roadside. After traveling a short distance, the appellants determined that the woman should be killed, and they returned in the car to her. When the

car's window came adjacent to the woman, Puiatti shot her twice. The appellants drove away, but, when they saw she was still standing, they drove by the victim again and Glock shot her. When the woman did not fall, the appellants made a third pass with the automobile, Glock shot her another time, and the woman collapsed.

Four days later, a New Jersey state trooper stopped the victim's vehicle because its license plate was improperly displayed. Puiatti and Glock occupied the automobile. When neither appellant could present a valid driver's license, the officer requested the car's registration. As Puiatti opened the glove box, the trooper saw a handgun. The officer seized that handgun, searched the vehicle, and uncovered another handgun. He then arrested both men for possession of handguns without permits. The police later identified the handgun from the glove box as the murder weapon.

The next day Puiatti and Glock individually confessed to the kidnapping, robbery, and killing. These initial confessions varied only to the extent that each blamed the other as instigator of the killing and each offered a differing sequence of who fired the

> shots at the victim. Each confessor admitted he had fired shots at the victim. Three days later, on August 24, Puiatti and Glock gave a joint statement concerning their involvement in the murder. In this joint confession, the appellants resolved the inconsistencies in their prior statements: they agreed that Glock initially suggested shooting the victim and that Puiatti fired the first shots and Glock fired the final shots

Puiatti v. State, 495 So. 2d 128, 129 (Fla. 1986).

The Eleventh Circuit's opinion, quoted the joint confession, in which Puiatti and Glock recounted their roles [quoted in part]:

> Detective Stahl asked Puiatti to describe the incident:
>
> ....
>
> We walked to a Shop and Go Store near Bradenton and called a taxicab to take us to the mall. We got to the mall about 8:00 o'clock that morning, and, uh, hung around until it opened. And that day we watched a couple of movies in the mall and we were kind of looking around in the parking lot for a customer to come in to try to get their car. We had no luck that day.

That night, later that night, we tried to hitchhike out of town and tried for a couple of hours, and it was about 1:00 o'clock in the morning and we had no luck. So there was a truck parked over by the mall and it was open, so we went in and slept for a few hours until that morning.

....

Okay. The following morning, which was Tuesday, the 16th, we went and got something to eat. And we were getting very low on money, so we waited around the mall parking lot until it opened again. And I'm not sure of the exact time.

Do you remember the time when she came?

....

Mr. Glock: It was approximately 10:20-10:30.

Mr. Puiatti: About 10:30 that morning a woman pulled into the mall parking lot in ... an orange 1977 Toyota SR-5 Corolla. That's what it was, Corolla.

At that time when she pulled in she had opened the door and started to get out of the car, and Robert had a handbag with a .38 in it and went up to her, put the gun on her, and she started to scream. And he told her to get in the backseat.

At that time I got in the car and started—and got behind the driver's wheel and started to pull out of the mall.

At that time Robert went through her purse and found fifty dollars and also found that she had a, uh, bank account. So she's offering to go to her bank and withdraw some money for us, and we—so we went to the Palmetto Bank on Palmetto Avenue and withdrew a hundred dollars in four twenties and two tens. She wrote out a check, and we went through the drive-through and withdrew it.

Puiatti said that he drove the car northbound until he found a dirt road through orange groves near Dade City, Florida. Puiatti drove the car through the dirt road until he saw a street, then turned around and stopped the car about halfway down the dirt road. Puiatti said they let Ritchie out of the car and, at her request, gave Ritchie her

purse and her husband's baseball glove They took her wedding band and diamond ring.

Puiatti and Glock jointly described how Glock suggested shooting Ritchie, how Puiatti fired the first two shots, and then Glock fired the rest, as follows:

By Detective Stahl: Question: Then what happened when you let her out of the car?

Mr. Puiatti: Okay. We left her and started to take off. And as we were taking off, we started talking back and forth, and *Robert said to me that he thought that we should shoot her.* And after going back and forth a little bit, I agreed, and turned the car around.

Then we drove up next to her and acted like we were looking for directions, and I shot her in the right—right by the right shoulder, and drove off.

When I was driving off, Robert noticed that she was still standing.

Mr. Glock: There were two shots fired at her, and then—interrupted—

Mr. Puiatti: You tell it.

Mr Glock: *When we first turned around and came back toward her on the first time, he shot the first time and hit her in the shoulder, the right shoulder, and then fired a second time. I don't know if the second time he hit her or that was when he missed her and hit the tree or whatever.*

Mr. Puiatti: Yeah.

Mr. Glock: *I don't know if he missed the second shot or not.*

Mr. Puiatti: *Yeah. It was because*— interrupted—

By Detective Stahl: *Question: You agree with that, Carl?*

Mr. Puiatti: Yeah.

Question: Go ahead, Bobby.

Mr. Glock: Then we kept on driving, and I noticed that she was still standing. Carl turned around and handed me the gun at that time and drove back by her, and I fired a shot. No, I fired two shots at that time.

Mr. Puiatti: Yeah.

Mr. Glock: I fired two shots. Uh, then we kept on driving back by, turned around again, (pausing).

Mr. Puiatti: Went back by again, stopped, (pausing).

Mr. Glock: Yeah. Stopped and turned around and headed back toward her.

Mr. Puiatti: (Affirmative nod.)

Detective Wiggins: She was still standing?

Mr. Glock: I only fired one shot at that time. Only fired two shots the whole time.

Mr. Puiatti: Three.

By Detective Stahl: Question: I just want to interrupt you. *Carl, at the time when you said you shot her once in the shoulder, then you shot in the chest; didn't you?*

Mr. Puiatti: Yes, I shot her twice.

Mr. Glock: *It was the third shot that you missed.*

Mr. Puiatti: *So those first two, yeah.*

Question: *So you shot her twice, Carl.*

Mr. Puiatti: Yes.

Question: Once in the shoulder, you said (interrupted).

Mr. Puiatti: And once in the chest area.

Question: Chest. And how many times—how many shots did you—(interrupted.)

Mr. Glock: Two.

Question: So how many shots in total did you fire?

Mr. Glock: Me?

Question: Yeah.

Mr. Glock: Two.

Question: And—(pausing)

Mr. Puiatti: Altogether, five. One missed.

Question: One missed. So that was a total of five shots?

Mr. Glock: The sixth shot got hung up in the gun and we didn't worry about it.

Question: Okay. And how many times did you go back now?

Mr. Glock: We passed by her once—twice—three times.

Question: Three times you went back *and on the third time what happened?*

Mr. Glock: That's when I fired my second and final shot, and that's when she—as we were driving away after the last shot, she fell over.

Mr. Puiatti: She walked about ten yards and then fell over.

(Emphasis added).

Puiatti v. McNeil, 626 F.3d at 1288-1290.

The jury recommended death by 11-1 and the trial court followed the jury's recommendation. The court found three aggravating circumstances, that the murder was committed to avoid arrest, the murder was committed for pecuniary gain, and that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. *Puiatti v. State*, 495 So. 2d at 130.

ii) Relevant State Court Legal Rulings

Severance

On his direct appeal to the Florida Supreme Court Petitioner asserted that the trial court abused its discretion in failing to sever his trial and penalty phase from his co-defendant, Glock. In rejecting this claim with regard to the penalty phase severance, the Florida Supreme Court stated:

> *Puiatti's Penalty Phase*
>
> Puiatti challenges his sentence of death by asserting five reversible errors during his penalty proceeding. First, he claims that the trial court's denial of a severance in the penalty phase prejudiced him, arguing that Glock presented antagonistic arguments on the aggravating circumstance of substantial domination and that the jury was exposed to improper instructions and prosecutorial argument relating to the non-existence of the mitigating factor of no significant prior criminal history. We hold that a severance was not required in the penalty phase of the trial. As to the alleged conflict concerning which defendant dominated the other, our decision in *McCray* disposes of this contention. In *McCray* we stated:

> [T]he fact that the defendant might have a better chance of acquittal or a strategic advantage if tried separately does not establish the right to a severance. Nor is hostility among defendants, or an attempt by one defendant to escape punishment by throwing the blame on a codefendant, a sufficient reason, by itself, to require severance. If the defendants engage in a swearing match as to who did what, the jury should resolve the conflicts and determine the truth of the matter.

416 So. 2d at 806 (citations omitted). *See also Dean v. State*, 478 So. 2d 38 (Fla. 1985). Further, we find the mere fact that only one of two codefendants has a significant prior criminal history does not require, in and of itself, a severance in the trial's penalty phase. The critical question is whether the jury was able to consider evidence presented by each defendant during the penalty phase and apply the law without being unduly confused or prejudiced. We find that, under the circumstances of this case, the jury could properly apply the facts to the law without confusion or prejudice.

Puiatti v. State, 495 So. 2d at 131.

iii) Relevant Federal Court Rulings

The District Court, issued an opinion, finding that although Puiatti and Glock were properly jointed for trial in the guilt phase, the state trial court erred in failing to grant a penalty phase severance and granted habeas relief. The 11th Circuit Court of Appeals reversed the district court, concluding that neither the 8th Amendment in general nor the particular facts of this case required severance. The court stated in part:

> The bottom line is Puiatti's prejudice claim essentially rests upon an implicit contention that a separate penalty trial is required whenever a co-defendant's presence might reduce a defendant's chance to avoid a death sentence. We have found nothing in severance law or Eighth Amendment jurisprudence to support this position. *See Zafiro*, 506 U.S. at 540, 113 S.Ct. at 938 (stating that "it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials"). Puiatti has failed to show any specific way that he was prejudiced by being tried jointly with Glock at the penalty phase.
>
> Indeed, the specific facts of this case made a joint penalty phase particularly appropriate. Puiatti and Glock acted together in planning and effecting the

abduction, robbery, and murder of Ritchie. Both Puiatti and Glock fired shots at Ritchie. It was Puiatti who was the first to fire shots at and strike the helpless victim from close range. Puiatti and Glock issued a joint interlocking confession that agreed on how many shots were fired, who fired each of them, and when. Puiatti and Glock kept driving by and shooting Ritchie until they were sure she would die. As the state trial court aptly noted, this case is a "classic example of why joint defendants ought to be [tried] together in order to get justice."

In fact, Puiatti's joint trial with Glock avoided the inequity of inconsistent verdicts and one capital defendant going second with the benefits of previewing the State's evidence and arguments. *See Richardson*, 481 U.S. at 210, 107 S.Ct. at 1708–09 (stating, "Joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts" and by not "randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand"). The *Lockett–Eddings–Penry–Abdul–Kabir* principle that the sentencer must be allowed to consider and give effect to "all relevant

> mitigating evidence," *see Eddings*, 455 U.S. at 117, 102 S.Ct. at 878, is quite compatible with a joint trial. To the extent any arguable tension may exist between joint trials and individualized sentencing, it did not occur here. *See Bernard*, 299 F.3d at 475 (noting potential tension between joinder and a defendant's right to an individualized capital sentencing decision, but affirming defendant's death sentence in a joint trial).
>
> If any two capital co-defendants could be properly joined in a penalty phase, it was Puiatti and Glock. Puiatti has not shown that his severance denial violated any constitutional right.

Puiatti, 626 F.3d at 1317-1318.

REASONS FOR DENYING THE WRIT

The question of whether two properly joined capital defendants found guilty in a joint trial can be sentenced in a joint penalty phase is not an issue which has divided state or federal courts of appeals and does not implicate a serious constitutional question for this Court's review. Further, under the particular facts of this case, the result is not fairly debatable.

Petitioner argues that this Court should review the Eleventh Circuit's decision denying his writ of habeas corpus on the basis of penalty phase severance. There is no conflict between the Eleventh Circuit and any other court of appeals. Moreover, the underlying state court decision is a presumptively valid fact based decision which does not present any conflict with this Court's precedent. Accordingly, the petition should be denied. See, Rule 10, Supreme Court Rules of Practice and Procedure (Certiorari review appropriate for cases which decide an "important question of federal law" which represent a conflict with relevant decisions of this Court, between United States courts of appeals, among state courts of last resort, or, present "a significant unsettled question" for this Court).

A. This Claim Was Not Properly Exhausted In State Court

The Eleventh Circuit assumed "for purposes of this opinion only that Puiatti exhausted this claim because it lacks merit in any event." *Puiatti*, 626 F.3d at 1308. The Respondent does not concede that this claim was properly exhausted in state court and argued exhaustion and procedural bar in its habeas response in the district court and on appeal to the Eleventh Circuit. Puiatti's direct appeal argument to the Florida Supreme Court did not mention, much less assert an Eighth Amendment fair and individualized sentencing claim. Nor, for that matter, did Puiatti's brief on direct appeal mention most of the supporting allegations of prejudice [opening argument and presentation of witnesses, Puiatti's failure to testify, and the Prosecutor's closing and jury instructions] argued here as grounds for habeas relief. The claim raised in federal court and for which Puiatti seeks review in this Court bears little resemblance to the claim presented in state court. (A1-A13: Excerpt, Puiatti's Direct Appeal Brief, Issue I, pgs. 9-18). See, *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 512 (1971) ("We emphasize that the federal claim must be fairly presented to the state courts.").

B. A Trial Judge Has Considerable Discretion To Rule On Whether Severance Is Necessary And The Fact Dependent Exercise Of Such Discretion Does Not Offend Any Constitutional Principle And Has Not Engendered Conflict Among Federal Or State Appellate Courts

There is no binding, or, for that matter, even persuasive legal precedent existing now, much less when this case became final in 1986, which suggests the state trial court abused its broad discretion in refusing to sever Puiatti's penalty phase from that of his co-defendant Bobby Glock. Indeed, joint trials and penalty phases are not disfavored by state law, or, more importantly, for this Court, federal constitutional law. As noted by this Court in *Richardson v. Marsh*, 481 U.S. 200, 209-210, 107 S. Ct. 1702, 1708-1709 (1987): "...It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand." See, *Maxwell v. Wainwright*, 490 So. 2d 927, 933 (Fla. 1986) ("Where co-defendants are tried together on a capital charge, there being no ground for a severance of the guilt-or-innocence phase of the trial, it is proper for the court to proceed with a joint sentencing trial so that the same jury that heard all

the guilt-phase evidence can consider and weigh the relative roles and culpability of the offenders.").

Addressing an allegation of Constitutional error surrounding the joint trial of a capital and non-capital defendant, this Court again noted the preference for joint trials:

> [] In joint trials, the jury obtains a more complete view of all the acts underlying the charges than would be possible in separate trials. From such a perspective, it may be able to arrive more reliably at its conclusions regarding the guilt or innocence of a particular defendant and to assign fairly the respective responsibilities of each defendant in the sentencing. See ABA Standards for Criminal Justice Standard 13-2.2 (2d ed. 1980). This jury perspective is particularly significant where, as here, all the crimes charged against the joined defendants arise out of one chain of events, where there is a single victim, and where, in fact, the defendants are indicted on several of the same counts.

Buchanan v. Kentucky, 483 U.S. 402, 418, 107 S. Ct. 2906, 2915 (1987) (emphasis added).

The defendants committed the murder, robbery and kidnapping of Mrs. Ritchie together, issued a joint confession, and their roles in the murder were not in dispute. The defendants were close in age, and

there was no vast disparity in either the quality or quantity of mitigating evidence. There was simply no compelling reason for the trial court to order a separate penalty phase for each defendant.

Petitioner acknowledges that federal law and the overwhelming majority of states provide for joint sentencing in capital cases.[1] (Cert. Pet. at 17). Nonetheless, Petitioner attempts to manufacture some type of conflict or "tension" in the law based upon two courts of appeals cases he suggests are inconsistent with the Eleventh Circuit's opinion in this case. These cases, as explained below, do not suggest, much less establish a conflict among courts of appeals.

Petitioner cites no case in which a court of appeals has reversed a state court on the question of penalty phase severance. The claim Puiatti presents for review simply has not been the subject of controversy among federal or state courts. Rarely have appellate courts reversed trial judges for refusal to sever a guilt or penalty phase for jointly tried defendants. See, e g., *Zafiro v. United States*, 506 U.S. 534, 538-39, 113 S. Ct. 933 (1993) ("Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion."); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 130-135 (2nd Cir. 2008) (finding no abuse of

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[1] Under Florida law, the jury that heard the guilt phase of the capital case also recommends the appropriate penalty *Maxwell v. Wainwright*, 490 So. 2d at 933; *McCray v. State*, 416 So. 2d 804 (Fla. 1982).

discretion from District Court's denial of El-Hage's motion to sever his trial from the trial of his death-eligible co-defendants, finding the record demonstrates a lack of prejudice "let alone prejudice sufficient to trigger the granting of a new trial, due to his joint trial with these co-defendants."); *People v. Burney*, 47 Cal. 4th 203, 256, 212 P.3d 639, 683, 97 Cal. Rptr.3d 348, 400-401 (Cal. 2009) (rejecting penalty phase severance claim where defendant argued he was prejudiced by "joinder of the trial of the three defendants, and the admission of the codefendants' statements, permitted the prosecutor to refer repeatedly to defendant's primary role in the murder."); *U.S. v. Tipton*, 90 F.3d 861, 892-893 (4th Circ. 1996) (while noting "the threat posed to individualized" sentencing from a joint penalty phase the court found no abuse of discretion on severance based upon repeated instructions to give "individualized consideration" to each defendant); *Com. v. Romero*, 595 Pa. 275, 307, 938 A.2d 362, 381 (Pa. 2007) (no abuse of discretion shown in denying penalty phase severance); *U.S. v. Rivera*, 363 F.Supp.2d 814, 822-825 (E.D. Va. 2005) (disposing of arguments against severance and the alleged threat to "individualized" sentencing noting that the "jury is being asked to make a judgment about group conduct and a joint trial will allow them to fairly judge the appropriate level of responsibility of each defendant.").

Puiatti cites *U.S. v. Tipton*, 90 F.3d 861, 892 (4th Cir. 1996) and *U.S. v. Bernard*, 299 F.3d 467, 475 (5th Cir. 2002) in his effort to find conflict or "tension" in the law. However, even a cursory review

of the fourth and fifth circuit opinions in those cases reveal that they are consistent with the Eleventh Circuit's decision in Puiatti's case. In each case, the court of appeals upheld joint capital penalty phase proceedings.

In *Tipton*, the Court affirmed the trial court's exercise of discretion in refusing to sever the penalty phases for three defendants. The court concluded, in part:

> Reviewing under that standard, we cannot find abuse of discretion here. The concerns raised by appellants are legitimate ones. But there are countervailing considerations that properly may be weighed in the discretionary balance. Because the relevant statutory provision, § 848(i)(1)(A), requires that, except in situations not present here, the penalty hearing shall be conducted before the same jury that determined guilt, severance here would have required three separate, largely repetitive penalty hearings before this jury. The same considerations of efficiency and fairness to the Government (and possibly the accused as well) that militate in favor of joint trials of jointly-charged defendants in the guilt phase, *see Lockhart v. McCree*, 476 U.S. 162, 181, 106 S.Ct. 1758, 1769, 90 L.Ed.2d 137 (1986); *Richardson v. Marsh*, 481

> U.S. 200, 210, 107 S.Ct. 1702, 1708-09, 95 L.Ed.2d 176 (1987), must remain generally in play at the penalty phase. The district court was therefore entitled to weigh those considerations in the balance.

Tipton, 90 F.3d at 892.

Similarly, the Fourth Circuit found no clear error in the failure to sever a capital defendant's penalty phase in *U.S. v. Bernard*, 299 F.3d 467, 475 (5th Cir. 2002). The court noted that severance lies in the trial court's discretion and citing *Zafiro v. United States*, [cite omitted] held that the "pro-Bernard mitigating evidence of which Vialva complains was not sufficiently 'mutually antagonistic' or 'irreconcilable' to him to suggest, much less compel, severance at the penalty phase." *Bernard*, 299 F 3d at 475.

The very few cases supporting severance represent nothing more than fact specific exercises of judicial discretion. Upon review, such cases do not conflict with the Eleventh Circuit's opinion in this case.

For example, in *U.S. v. Catalan-Roman*, 376 F.Supp 2d 96 (D.P.R. 2005), cited by Petitioner, the district court exercised its discretion in ordering a sequential penalty phase before the same jury for two capital defendants who had been convicted of murder in a joint trial. The district court in *Catalan-Roman* noted that the prosecution's theory of responsibility

between the two defendants favored "one defendant more than the other" and the "affected defendant" claimed he would "bring information to cast doubt as to the Government's version of facts" to show "how more culpable his co-defendant was." Moreover, this factor in favor of severance was coupled with a perceived vast disparity in quantity and quality of mitigation evidence between the two defendants:

> Lastly, during the *ex parte in camera* hearing, Mr. West [Medina's counsel] stressed the high risk dilution of Medina's mitigating information in light of Catalan's very powerful mitigation regarding his good behavior before and after he was arrested. Because of Medina's lack of commensurate mitigation, Mr. West claimed that continuing with a joint penalty trial would overshadow Medina's right to an individualized determination because the jury would be unable to forgo comparing the two defendants.

Catalan-Roman, 376 F.Supp.2d at 106.

Catalan-Roman is easily distinguished from the instant case. First, *Catalan-Roman* was a federal district court exercising its own discretion on a motion to sever capital co-defendants, not a district court resolving a habeas claim for a presumptively valid state court sentence for which a federal court must accord deference. Moreover, the court in *Catalan-Roman* was faced with a much different factual scenario, where the Government was pointing

the finger at one defendant as the shooter and the individual most responsible for the capital murder. Here, there is a joint confession, in which Petitioner did most of the talking, which specified each defendant's role and established equal culpability in the victim's murder. Further, *sub judice*, there was not a vast or even appreciable difference in the quantity or quality of the mitigating evidence presented by the defendants as in *Catalan-Roman*. Finally, despite the concerns in *Catalan-Roman*, the court did not order a separate jury to hear each case, rather it ordered a sequential proceeding, thereby allowing the guilt phase jury to determine the appropriate sentence for each defendant.[2]

Puiatti argues that joint sentencing proceedings in this case violate the fair and individualized sentencing this Court held was necessary for a capital defendant in *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954 (1978). Puiatti appears to be asking this Court to announce a new rule based upon a novel and in the Respondent's view, an unnatural expansion of *Lockett*. Extending *Lockett* to preclude or inhibit joint sentencing would divest state and federal trial judges of discretion on the severance issue in capital cases. Critically, Puiatti has failed to establish that a single court of appeals or state court has interpreted this Court's decision in *Lockett* to preclude joint sentencing for two defendants who

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[2] In *U.S. v. Henderson*, 442 F.Supp.2d 159 (S.D.N.Y. 2006), the district court denied the motion to empanel a separate penalty phase jury for each defendant and exercised its discretion to order sequential sentencing, a remedy advocated by the Government.

were properly tried together in the guilt phase. Thus, there is no conflict in the law worthy of this Court's consideration in this case.

The Eleventh Circuit properly recognized in affirming the rulings of the state courts below, that *Lockett* did not address joint sentencing of capital defendants. The Eleventh Circuit did not, as Puiatti repeatedly suggests, assert that a capital defendant is not entitled to a fair or individualized sentencing. The court did, however, recognize that *Lockett* does no more than prevent a court from limiting the mitigating evidence a defendant may present or by its instructions impermissibly preclude a jury from considering a defendant's mitigating evidence.[3] The Eleventh Circuit did not misinterpret *Lockett*. In *Johnson v. Texas*, 509 U.S. 350, 113 S. Ct. 2658 (1993), this Court emphasized that *Lockett* and its progeny "stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all." *Johnson*, 509 U.S. at 368.

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[3] As stated by the Eleventh Circuit: " . . although Puiatti attempts to connect and intertwine severance with his constitutional right to an individualized sentencing determination, we can locate, and Puiatti has cited, no Supreme Court decision doing so. *Lockett* and its progeny do not address joint penalty phases or say that the presence of a co-defendant at a capital defendant's penalty phase trial has any Eighth Amendment implications whatsoever. None of the *Lockett* line of cases relates to severance or helps Puiatti's claim at all." Puiatti, 626 F.3d at 1314-1315.

The Eleventh Circuit specifically found that Puiatti was not limited in his presentation of mitigating evidence, nor, was the jury limited by instructions from considering any mitigating evidence submitted by Puiatti during his joint penalty phase with Glock. The Eleventh Circuit stated:

> First, Puiatti was not prevented from presenting any mitigating evidence. Puiatti has not proffered a single piece of evidence he was unable to put before the jury or judge for consideration by virtue of the joint penalty phase.
>
> Second, no state statute nor judicial interpretation nor jury instruction restricted the jury or judge from considering, or acting upon, Puiatti's mitigation evidence. Rather, the Florida trial court appropriately instructed the jury during the penalty phase to carefully weigh and consider "all of" the evidence presented, stating, "Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and you should bring to bear your best judgment in reaching your advisory sentence."

> The state trial court also instructed the jury about the potential sentences for Glock and Puiatti separately and individually. FN29 [omitted] "Jurors routinely serve as impartial factfinders in cases that involve sensitive, even life-and-death matters" and "[i]n those cases, as in all cases, juries are presumed to follow the court's instructions." *Hammond v. Hall*, 586 F.3d 1289, 1334 (11th Cir. 2009) (quoting *CSX Transp., Inc. v. Hensley*, -- -- U.S. ----, 129 S.Ct. 2139, 2141, 173 L.Ed.2d 1184 (2009)). Courts presume that the jury heard, understood, and followed the court's instructions. *Richardson*, 481 U.S. at 208-11, 107 S.Ct. at 1708-09.

Puiatti, 626 F.3d at 1314-1315.

Assuming for a moment this Court were to entertain Petitioner's invitation to interpret or extend *Lockett* to inhibit or preclude joint penalty phases in capital cases, announcing such a rule and applying it to a case which has been final for more than twenty years would violate *Teague v. Lane*, 489 U.S. 288, 311, 109 S. Ct. 1060, 1075 (1989). *Teague* held that constitutional claims may not be raised on collateral review if they are based upon a new rule that was announced after the conviction and sentence became final. 489 U.S. at 311. This Court has explained that *Teague* validates reasonable good faith interpretations of existing precedent. *Butler v.*

McKellar, 494 U.S. 407, 110 S. Ct. 1212 (1990). Precedent existing at the time of trial did not suggest, much less require a separate penalty phase for defendants who were properly joined for trial in the guilt phase.[4] See, *Gutierrez v. Dretke*, 392 F.Supp.2d 802, 829 (W.D. Tex. 2005) ("Insofar as petitioner argues the Eighth Amendment compels a state trial court to hold a separate trial on punishment for every capital murder defendant found guilty with other defendants of participating in the same capital murder, respondent correctly points out that this Court is foreclosed from recognizing such a new rule in this habeas corpus proceeding by the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 310, 109 S.Ct. 1060, 1075, 103 L.Ed.2d 334 (1989).").

The Eleventh Circuit in this case properly credited the assessment of the state trial court below that severance was not required in order for Puiatti and Glock to receive a fair penalty phase. The exercise of such judicial discretion, under the particular facts of this case, does not offend any

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[4] The State did not waive a *Teague* bar. It was timely presented in a 60(b) motion when it appeared the district court was essentially interpreting or extending *Lockett* to preclude joint capital penalty phase proceedings. The State argued a *Teague* bar in its 11th Circuit initial brief. The Eleventh Circuit, however, did not address the *Teague* bar. The State did not below and does not now waive reliance upon *Teague*. See, *Schiro v. Farley*, 510 U.S. 222, 228-229, 114 S. Ct. 783, 788-789 (1994) (noting that the State may generally argue any legal theory to support the lower court judgment but declining to apply the *Teague* bar when it was argued for the first time on the merits where the State failed to raise this bar in its response to the certiorari petition)

constitutional principle. Petitioner has not cited any conflicting authority from this Court, other courts of appeals, or state courts to support certiorari review. See *Rockford Life Insurance Co. v. Illinois Department of Revenue*, 482 U.S. 182, 184, n. 3 (1987) (noting that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit certiorari review). Accordingly, certiorari should be denied.

C. The Eleventh Circuit's Decision On Severance Is Supported by The Record, Is Wholly Dependent On The Particular Facts Of This Case, And Is Of Significance To No One Other Than The Parties To This Litigation.

Petitioner is asking this Court to review and reverse the Eleventh Circuit decision affirming the state trial judge's exercise of discretion [affirmed by the Florida Supreme Court] in denying a penalty phase severance for Glock and Puiatti. As an exercise of judicial discretion by the state trial judge on habeas review, this decision is wholly dependent on the facts of the case and of significance to no one other than the parties to this litigation. See, *U.S. v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497 (1925) ("We do not grant certiorari to review evidence and discuss specific facts."). Consequently, this Court should decline to exercise certiorari jurisdiction over this case. See, *Chevron U.S.A., Inc. v. Sheffield*, 471 U.S. 1140, 105 S. Ct. 2686 (1985); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S. Ct. 614 (1955); *Layne & Bowler Corp. v. Western Well*

Works, 261 U.S. 387, 43 S. Ct. 422 (1923). Moreover, a review of the Eleventh Circuit's detailed opinion accompanying the denial of this claim establishes correct application of this Court's precedent.

An abuse of the trial court's discretion cannot be found on the basis of this record, much less a serious constitutional error requiring grant of the writ. See, *Johnson v. Dugger*, 817 F.2d 726, 728 (11th Cir. 1987) (Regardless of the state law governing severance in state trials, a federal court will not grant relief to a habeas petitioner on this issue unless he can establish that the failure to grant severance rendered the trial "fundamentally unfair."). As found by the Eleventh Circuit below, "[i]f any two defendants could be properly joined in a penalty phase, it was Puiatti and Glock." *Puiatti*, 626 F.3d at 1318. The defendants committed the murder, robbery and kidnapping of Mrs. Ritchie together, issued a joint confession, and their roles in the murder were not in dispute. The defendants were close in age, and there was no vast disparity in either the quality or quantity of mitigating evidence. There was simply no compelling reason for the trial court to grant a separate penalty phase for each defendant. The grounds alleged by Puiatti in support of severance are either not supported by the record, not persuasive, or simply insufficient to support finding an abuse of discretion in this case, much less a serious constitutional error.

Puiatti and Glock did not pursue materially inconsistent penalty phase theories. They were both classified as followers and unlikely to commit the crime if they were alone. Significantly, Dr. Mussenden, Glock's mental health expert, did not assert that Glock was under the influence or domination of Puiatti.[5] Similarly, Dr. DelBeato [one of Puiatti's two mental health experts] did not testify that Puiatti was under the influence or domination of Glock. Rather, he testified that based upon Puiatti's personality, stress, and brain damage, he "could have been easily influenced." (T10/2296). In fact, Dr. DelBeato testified on cross-examination by the State that I "couldn't say duress or ..." "[substantial domination]" mitigator applied in this case. (T10/2297) Dr. Meadows did briefly mention that based upon Petitioner's personality characteristics, he was under the influence or domination of another person [presumably Glock] at the time of the offense.[6] However, Dr. Mussenden did not relate his conclusion to the particular facts of this case and even a cursory review of Puiatti's joint confession with Glock refutes this theory.[7]

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[5] Dr Mussenden did testify that this was atypical behavior for Glock and that he would probably not have committed the crime unless he was with someone else. (T10/2348-49).

[6] Contrary to Puiatti's argument, the trial court's sentencing order correctly referenced the mental health testimony, noting that Puiatti called Dr. Meadows and Dr. DelBeato while Glock called Dr. Mussenden. (R2/317, Sentencing Record).

[7] The fact that one of Puiatti's experts asserted that Puiatti was under the influence of Glock might support Glock's contention that he was prejudiced by the joint penalty phase, but, does not in any way suggest Puiatti was prejudiced.

However, even if Glock and Puiatti's mitigation theories were antagonistic, this fact alone does not require severance. As noted by the Eleventh Circuit below:

> In *Zafiro*, the Supreme Court explained that "[m]utually antagonistic defenses are not prejudicial per se." [FN19] *Zafiro*, 506 U.S. at 538, 113 S.Ct. at 938; *see Blankenship*, 382 F.3d at 1122 (stating *Zafiro* "specifically rejected the notion that defendants who have contradictory defenses are inherently prejudiced"). And "it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." *Zafiro*, 506 U.S. at 540, 113 S.Ct. at 938.
>
> > FN19. In *Zafiro*, the Supreme Court surveyed circuit court decisions and observed that "the courts have reversed relatively few convictions for failure to grant a severance on grounds of mutually antagonistic or irreconcilable defenses." 506 U.S. at 538, 113 S.Ct. at 937.

Puiatti, 626 F.3d at 1310.

Puiatti argues that he was prejudiced by the joint penalty phase in that his two mental health experts faced cross-examination by counsel for co-defendant, Glock.[8] However, the entire cross-examination of Dr. DelBeato by Glock's counsel consisted of the following:

> Q: Dr. DelBeato, is it true that most people are more easily influenced when they're under stress?
>
> A: Yes.
>
> Q: And is it fair to say that whether or not somebody is being influenced or manipulated by another, that only depends on the person, the psychological profile of the person that's being influenced, but also the possibility of a person who's in the position to influence the psychological profile.
>
> A: There would be a relationship.
>
> Q: And you have never examined this man?
>
> A: No.

(T10/2257).

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[8] Glock's counsel did not cross-examine Puiatti's lay witnesses

Not a single point damaging to Puiatti's case in mitigation can be discerned from the foregoing colloquy The lengthy and damaging cross-examination of Dr. DelBeato came entirely from the State, and, was proper and would have occurred whether Petitioner and Glock were tried together or separately. Similarly, the cross-examination of Dr. Meadows, Petitioner's remaining mental health expert, by Glock's counsel, cannot be described as compelling.

The entire cross-examination of Dr. Meadows by Glock's counsel consisted of the following:

> Q: Dr. Meadows, whether - - is it fair to say that whether or not Mr. Puiatti was under substantial domination of another person at the time of the offense would depend upon the psychological profile of the other person?
>
> A: Without understanding, you know, in detail, I would say it is possible, yes.
>
> Q: Have you ever done any tests or reviewed any records of Robert Glock, II?
>
> A: The confession, um, I have had some sketchy data about his background and temperament from the defendant, from Mr. Puiatti's counselor.

> Q: Okay. But you have not seen any psychological testing, or reports of Mr. Glock, is that correct?
>
> A: That's correct.

(T10/2428). Again, this extremely brief cross-examination by Glock's counsel was not damaging to Petitioner.

Puiatti mentions that the prosecutor linked the two defendants in his penalty phase closing argument. However, this fact does not in any manner support Puiatti's severance claim. Although the prosecutor argued in closing the defendants were like two "peas" in a "pod," Puiatti's counsel also noted similarities between the two defendants. Defense counsel argued: "The family also said that Carl was attracted to misfits and when asked a question by Mr. Cole [prosecutor] whether Carl was perhaps one of those himself, Mrs. Puiatti said she wouldn't deny that he had problems. Nonetheless, misfits, both of them misfits..." (T11/2510). Given the facts of this case, and, the joint confession, the State is hard pressed to envision an argument by the prosecutor which would not link the two defendants. The prosecutor could appropriately make the same argument whether Puiatti and Glock were tried by separate penalty phase juries.

The undisputed record indicates that Puiatti was at the very least, an equal participant in the kidnapping, terrorizing and murder of Mrs. Ritchie.[9] This is not a case where one co-defendant accused the other of being the triggerman during the penalty phase. Yet, even this far more potentially damaging penalty phase scenario did not demand habeas relief in *Rastafari v. Anderson*, 117 F.Supp.2d 788, 806 (N.D. Ind. 2000). In *Rastafari*, the court denied habeas relief for failure to sever the penalty phase and ineffective assistance where each defendant pointed the finger at the other as the triggerman, noting that "there is certainly a quantity of evidence to suggest that the jury's task was made more difficult because the defendants were not severed during the penalty phase, this court is not persuaded that the jury was unable to give individualized attention to each defendant's character, history, and the offense in question."

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[9] Indeed, the joint penalty phase precluded the prosecutor from shifting more of the blame on Petitioner. Though Glock may have initially suggested they kill the victim, Petitioner agreed, and, turned the car around so that the victim could be murdered. It was Puiatti who was the first to fire shots at and strike the helpless and compliant victim from close range. Puiatti admitted his shots struck the victim in the shoulder and chest. (T9/1996). It was also Puiatti who repeatedly drove the car back to the victim so that he and Glock could ensure her death.

Puiatti's contention that the jury may have held the fact Petitioner chose not to testify during the penalty phase against him[10] simply because Glock chose to testify is speculative and unwarranted given the jury instructions in this case. During the guilt phase the jury was specifically advised by the trial court not to hold the fact the defendant failed to testify against him. Further, this claim of prejudice was not made on direct appeal to the Florida Supreme Court and therefore was not exhausted in state court.

Petitioner's claim that "Puiatti was never able to make any similar statement to the jury[]" referencing Glock's decision to testify, is perplexing. (Cert. Pet. at 5). Puiatti certainly had the option to testify in front of the jury, but, for whatever reason, chose not

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[10] In the guilt phase the jury was specifically instructed that it could not hold the fact the defendant chose not to testify against him. Courts generally presume the jury follows instructions *Richardson v. Marsh*, 481 U.S. at 207 (noting the "almost invariable assumption" of the law that jurors follow their instructions) There is nothing in this record to overcome that presumption in this case. Courts have generally held that reinstruction on guilt phase instructions such as not testifying is not necessary in the penalty phase as the jury is expected to remember and apply those instructions. See, *People v. Stanley*, 39 Cal.4th 913, 961-962, 140 P 3d 736, 770 (Cal. 2006) (finding no reversible error where the court failed to reinstruct the jury not to draw an adverse inference from defendant's failure to testify in the penalty phase.). *People v Hardy*, 2 Cal 4th 86, 209, 825 P.2d 781, 857 (Cal. 1992) ("Although the trial court failed to reinstruct the jury not to draw any adverse inference from Hardy's silence at the penalty phase, it had no duty to do so.").

to. Puiatti's choice cannot be blamed on his joint penalty phase with Glock.[11]

Puiatti cites no evidence in the record that the jury or trial court impermissibly refused to consider the two defendants as individuals. The trial court's instructions clearly advised the jury that they were to consider each defendant and each sentence separately and render a separate recommendation for each defendant. (T11/2525-27). At no point did the trial court suggest that a single sentence or consistent sentence should be rendered for each defendant. Moreover, Puiatti failed to object to the trial court's instructions or request any special penalty phase instructions on the question of separate sentencing recommendations. Thus, Puiatti's repeated reference to the lack of, or inadequacy of the trial court's instructions in this case is a point which is unpreserved, and unexhausted in state court.

A fact intensive review of the 11th Circuit's decision as requested by Puiatti, would simply not lead to a different result. Despite Puiatti's attempt to conflate a case for prejudice emanating from his joint sentencing with Glock, the facts of this case render a joint penalty phase particularly appropriate. (same charged crimes, same victim and joint confession). This petition does not present an important unsettled issue of law and the underlying

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[11] Nor, can Puiatti blame his joint sentencing on the jury's exposure to Puiatti's criminal history. As noted by the Eleventh Circuit, Puiatti's own witnesses revealed his criminal history. See, e.g., T10/2380-82, 2398. *Puiatti*, 626 F 3d at 1317

decision does not conflict with any of this Court's precedent. Accordingly, the petition for writ of certiorari should be denied.

D. Any Severance Error Would Be Harmless Under *Brecht*

Finally, assuming for a moment that a constitutional error can be discerned on this record, *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710 (1993) compels denial of the writ in this case. As noted by this Court in *Brecht*, habeas relief is designed to afford relief only to those whom society has "grievously wronged." *Brecht*, 507 U.S. at 637, 113 S. Ct. 1710. The grant of habeas relief must rest upon some compelling factual or legal basis, not simply substitution of a federal court's discretion for that of the state trial court below. See, *Calderon v. Thompson*, 523 U.S. 538, 539, 555-556, 118 S. Ct. 1489, 1493, 1500-01 (1998) (recognizing the "'the profound societal costs that attend the exercise of habeas jurisdiction,'" and the restrictions placed on granting habeas relief to reflect the Court's "enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system.'")(quoting *Smith v. Murray*, 477 U.S. 527, 539 (1986) and *Brecht* at 635)

Not a single aggravating or mitigating factor would be altered or changed under the facts of this case had Petitioner been tried separately from Glock. The same three aggravating factors [CCP, avoid arrest, and prior violent felony] are balanced against the same case in mitigation. Since the underlying

facts of this heavily aggravated case remain unchanged with an 11-1 jury recommendation,[12] it is simply inconceivable that the jury or trial court below would have reached a different decision if only Puiatti's penalty phase had been separated from Glock's. This was a highly aggravated case, involving the kidnapping and cruel murder of a helpless and compliant victim. This was no spontaneous or quick murder from a robbery gone bad, but a cold, and cruel decision to end an innocent and terrified young woman's life. This case is shocking in that it was so cold, and methodical, with the defendants repeatedly returning to ensure the victim's death. A substantial and injurious effect on the penalty phase has not been shown. See, *Calderon v. Coleman*, 525 U.S. 141, 147, 119 S. Ct. 500, 504 (1998) ("The court must find that the error, in the whole context of the particular case, had a substantial and injurious effect or influence on the jury's verdict.").

In conclusion, Petitioner has failed to demonstrate that the Eleventh Circuit's decision is inconsistent with any decision from this Court or any other court of appeals. A fact intensive review of the state trial court's exercise of discretion in this case would have no impact beyond the interests of the parties. See, *Rudolph v. United States*, 370 U.S. 269, 82 S. Ct. 1277 (1962) (recognizing that a certiorari petition predicated on reviewing facts of importance only "to the litigants themselves" was an inappropriate ground to grant a writ).

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[12] Florida is a majority jury vote state on the penalty phase jury recommendation.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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